Office - Supreme Court, U. S.
FILED
APR 28 1953
HAROLD B. WILLEY, Clerk

345 US

SUPREME COURT OF THE UNITED STATES

PEA-POL
32

OCTOBER TERM, 1952

No. 751

PEARL PEARCE,

Petitioner,

vs.

PREVIEWS, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CLAUDE PEPPER,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1–10
Summary statement of the case	2
Jurisdiction of this Court	7
Questions Presented	8
Reasons relied on for the allowance of the writ	10
Brief in support of petition for certiorari	11–36
Report of Opinions Delivered in the Courts Below	11
Grounds on which the jurisdiction of this Court is invoked	11
Statement of the case	12
Specification of errors	14
Summary of argument	14
Argument	15
Conclusion	36
Appendix—Applicable Statutes	37–45

Table of Cases Cited

American Federation of Labor v. *Watson*, 327 U.S. 582, 66 S. Ct. 761, 90 L. ed. 873 (1946)	8
Ahern v. *Florida Real Estate Commission*, 149 Fla. 706, 6 So. 2d 857 (1942)	25
Bendell v. *De Dominicis*, 251 N.Y. 305, 167 N.E. 452 (1929)	30
Bratton v. *Chandler*, 260 U.S. 110, 43 S. Ct. 43, 67 L. ed. 157 (1922)	25, 26
Citizens Bank and Trust Co. v. *Mabry*, 102 Fla. 1084, 136 So. 715 (1931)	28
Davis v. *Chipman*, 210 Cal. 609, 293 P. 40 (1930)	30
Driscoll v. *Edison Power & Light Co.*, 307 U.S. 104, 59 S. Ct. 715, 83 L. ed. 1134 (1938)	8
Erie R. Co. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938)	7, 8, 30, 34, 36
Holland v. *Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121 (1938)	24, 25, 26

APR 22 1954

205397

Page

Kellogg-Citizens Nat. Bank v. *Felton*, 145 Fla. 68, 199 So. 51 (1940) 29, 30
Klaxton Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941) 7, 8, 30, 34, 36
Knight v. *Watson*, 221 Ala. 69, 127 So. 841 (1930) 30
Land Co. of Florida v. *Fetty*, 15 F. 2d 942 (1926) 26, 27
Mott v. *First Nat. Bank*, 98 Fla. 444, 124 So. 36 (1929) 28, 29
Owens v. *Capri*, 202 P. 2d 174 (1949) 30
Pratt v. *Sloan*, 41 Ga. App. 150, 152 S.E. 275 (1930) 30
Reed v. *Kelly*, 177 F. 2d 473, C.A. (1949) 7, 10, 31–33
Robert G. Lassiter and Co. v. *Taylor*, 99 Fla. 843, 128 S. 14 (1930) 27, 28
Robertson v. *California*, 328 U.S. 440, 66 S. Ct. 1160, 90 L. ed. 1366 (1946) 26
State ex rel. Baskin et al. v. *Bird*, 90 Fla. 335, 105 So. 822 (1925) 22, 23
State v. *Rose*, 97 Fla. 710, 122 So. 225 (1929) 23, 25
Sutton v. *Leib*, 342 U.S. 402, 72 S. Ct. 398, 96 L. ed. 448 (1952) 8, 35
Thompson v. *Magnolia Petroleum Co.*, 309 U.S. 478, 60 S. Ct. 628, 84 L. ed. 876 (1939) 8, 35
Zichlin v. *Dill*, 157 Fla. 96, 25 So. 2d 4 (1946) 26

Statutes and Other Authorities Cited

Florida Statutes, 1951 475.01 ..... 3, 4, 16, 17, 20, 21, 24, 37-40
Florida Statutes, 1951 475.02 ..... 17, 40
Florida Statutes, 1951 475.13 ..... 17, 40-1
Florida Statutes, 1951 475.14 ..... 20-21, 41
Florida Statutes, 1951 475.15 ..... 17, 41
Florida Statutes, 1951 475.16 ..... 18, 41
Florida Statutes, 1951 475.17 ..... 17-18, 41-2
Florida Statutes, 1951 475.19 ..... 18, 42-3
Florida Statutes, 1951 475.41 ..... 2, 15, 43
Florida Statutes, 1951 475.42 ..... 3, 16, 43-4
Florida Statutes, 1951 475.45 44
Florida Statutes, 1951 205.01 44
Florida Statutes, 1951 205.52 45
Florida Statutes, 1951 205.65 45
Laws of Florida 1923, c. 9177 ..... 15, 26

Page
Laws of Florida 1925, c. 10233 ..... 15, 22, 23
Laws of Florida, 1925, c. 11336 15
Laws of Florida 1927, c. 12223 15
Rules of The Supreme Court of the United States, Rule 38 7
Title 28, U.S.C. par. 1254(1) 7, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 751

PEARL PEARCE,

Petitioner,

v.

PREVIEWS, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, PEARL PEARCE, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court entered on January 29, 1953, affirming a Summary Judgment for Respondent by the United States District Court of the Southern District of Florida, Tampa Division, which was filed on June 30, 1952.

Summary Statement of the Case

The respondent instituted a suit against the petitioner on August 16, 1951, in the United States District Court for the Southern District of Florida, Tampa Division (R. 1) to recover Thirteen Thousand Five Hundred Dollars ($13,500.00), the balance alleged to be due on a contract (R. 4-7) in which respondent undertook to promote the sale, and among other things to list the property on behalf of the petitioner with real estate brokers and to handle all sales negotiations, concerning over three thousand (3,000) acres of land of the petitioner located in Highlands County, Florida, (R. 4). In the contract the petitioner agreed to pay the respondent a fee of ten percent (10%) of the sale price or exchange valuation of the land, no matter who brought about the sale or exchange (R. 4). The contract was signed by the petitioner on August 9, 1950, in Florida, and accepted by the President of the respondent, J. C. Tysen, on August 10, 1950, in New York City (R. 5). The petitioner upon the signing of the contract paid Fifteen Hundred Dollars ($1500.00) as part payment of the promotional costs of respondent, which amount was not returnable but to be credited against the fee due upon the sale of the land (R. 2, 5). About May 1, 1951, petitioner sold the land for One Hundred and Fifty Thousand Dollars ($150,000.00) without the assistance of the respondent (R. 2). The Florida Real Estate License Law (Chapter 475, Florida Statutes 1951, see Appendix A) in force at the time the above contract was executed provides that:

> "No contract for a commission or compensation for any act or service enumerated in sub-section (2) of Section 475.01 shall be valid unless the broker or salesman shall have complied with this Chapter in regard to registration and renewal of the certificate at the time the act or service was performed." (Sec. 475.41).

"No person shall operate as a real estate broker or salesman without being the holder of a valid current registration certificate." (Sec. 475.42).

* * * * *

"Every person who shall, in this state, for another, and for a compensation . . . offer, attempt or agree to . . . negotiate the sale . . . of any real property; or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of . . . selling . . . real estate; and every person who shall take any part in the procuring of . . . purchasers . . . of the real property . . . ; or who shall direct or assist in the procuring of prospects, or the negotiation or closing of any transaction which . . . is calculated to result in a sale . . . and who shall . . . be promised any compensation . . . directly or indirectly therefor; and all persons who are . . . officers . . . of corporations engaged in performing any of the aforesaid acts or services; each and every such person shall be deemed and held to be a real estate broker . . ." (Sec. 475.01 (2)).

and further,

". . . and all officers . . . of a corporation, which . . . corporation is defined by said subsection to be a real estate broker, shall be deemed and held to be operating as real estate brokers;" (Sec. 475.01 (3)).

The Florida real estate license law further provides that all real estate brokers or salesmen are required to register, but that registration alone shall not entitle the registrant to operate as a broker or salesman; that a registration certificate shall be issued upon the applicant's registration and the payment of the required fee; that the registration certificate, except non-active registration certificate, shall authorize the holder to act as a broker or salesman; that every broker shall renew his or her registration annually;

that an annual occupational license is required of real estate brokers and no collector or county judge may issue any real estate occupational license except upon presentation of an active registration certificate.

The Florida law relating to real estate brokers and salesmen further provides that any member of a partnership or officer or director of a corporation *who does not desire to perform any of the acts* (italics ours) enumerated in sub-section 2 of section 475.01 may apply for a certificate as a non-active broker; that every partnership and corporation required to be registered shall register and annually renew the certificates of its members, officers and directors.

The qualification requirements for registration under the Florida law of all natural persons including officers and directors are very thorough and exacting. The applicant must show among other things, that he is honest, truthful, trustworthy, of good character, and that he bears a good reputation for fair dealing; that he is competent and qualified to make real estate transactions, and would negotiate therefor with safety to the investor and to those with whom he may undertake a relationship of trust and confidence.

Applicants for registration as active brokers are required to appear in person before the Florida Real Estate Commission and answer questions touching their qualifications under the provisions of the Florida real estate license law. The law further provides that the commission of *a single act* (italics ours) described in section 475.01 (2) and section 475.01 (3) shall be sufficient to bring a person within the meaning of the chapter and, further, that each single act described in the above referred to sections and prohibited therein shall constitute a separate offense unless such person has complied fully with the Florida law touching upon this subject.

The respondent, a corporate entity, was qualified to do

business and was registered as an active real estate broker in Florida, as also was its Regional Vice President, one B. R. Shaffer, Jr., (R. 9, 16) but J. C. Tysen, President of respondent, who accepted the contract with petitioner in New York City and under whose general authority and direction the contract was to be carried out and several acts in execution thereof, some in Florida, were performed, was not a qualified real estate broker under the Florida law. (R. 9-11).

The President of respondent, J. C. Tysen, was only registered in Florida as a non-active broker. (R. 10).

The complaint did not state what respondent did toward the execution of the contract (R. 2-3) but paragraph IX of the Answer of the petitioner in the District Court, which was stricken by the District Court as not presenting a defense to the declaration, stated that: "Pursuant to said alleged contract, plaintiff prepared in New York through its said officers" (which included J. C. Tysen, president) "and employees, an illustrated description of the property (herein called a brochure) containing an aerial photograph and descriptive matter, which the said Shaffer obtained in Florida and transmitted to New York for that purpose. Said brochure was printed in New York and distributed to real estate brokers in Florida from New York and from West Palm Beach. It contains among other things the following:

> " 'Owner: Miss Pearl Pearce, c/o Previews, Inc. 270 South County Rd., Palm Beach, Fla., Tel.: Palm Beach 2-0151, or c/o Previews, Inc., 49 E. 53rd St., New York 22, N. Y. Tel.: PLaza 8-2630.'
> 'Inspection: By arrangement with Previews, Inc., at above addresses.' " (R. 11)

The petitioner denied liability in the District Court on the grounds that:

> 1. The respondent did not have any part or influence in bringing about the sale of the property (R. 9); and

2. The contract was invalid under the Florida law because it was signed for respondent by its President in New York and its corporate President was not individually registered under Florida Real Estate License Law to act as an active real estate broker (R. 9-12).

A motion by respondent to strike the above defenses as insufficient, immaterial and irrelevant was granted by the District Court on March 17, 1952 (R. 13-14). On June 19, 1952, respondent filed a motion for Summary Judgment (R. 14-17) under Rule 56 of the Federal Rules of Civil Procedure. On June 23, 1952, the petitioner moved the District Court to suspend further proceedings and to retain jurisdiction of the complaint for a reasonable time to afford an opportunity by appropriate action for a construction of the Florida real estate license law by the courts of the State of Florida and presented the following issues for determination of the District Court, to-wit:

1. The contract sued on violates the provisions of the Florida real estate license law;

2. The contract sued on contravenes public policy of Florida as established by that law;

3. Notwithstanding the alleged contract was negotiated and signed in New York, it cannot be enforced in Florida (in State or Federal Court) for the reasons stated in (1) and (2) above, and further because

4. Florida is the place of performance.

5. Respondent, together with its officers and directors, was registered in Florida under the provisions of said chapter at the time the alleged contract was made, but the alleged contract was procured and executed by an officer of respondent who was not registered as an active real estate broker (R. 18-19).

The District Court denied the motion of the petitioner to suspend further proceedings on June 30, 1952 (R. 20)

and on the same day entered a summary judgment for respondent.

The Court of Appeals for the Fifth Circuit affirmed this judgment on January 29, 1953 (R. 31) and denied the petition of petitioner for a re-hearing on February 25, 1953 (R. 41).

Jurisdiction of This Court

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1953 (R. 31). The opinion of the Court (R. 29-31) is reported at 201 F. 2d 385. The order denying petition for rehearing was entered on February 25, 1953 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

The Court of Appeals in this case has decided an important question of local law in a way in conflict with applicable local decisions. That is to say, the court affirmed the judgment of the District Court in Florida allowing recovery by the respondent, a New York corporation, on a brokerage contract for the sale of Florida land in direct violation of the Florida real estate license law which, with applicable local decisions, was the declared public policy of Florida. A Florida court would not have allowed recovery in such case; hence, the District Court should not have allowed recovery. The Court of Appeals was in error in affirming the District Court. This court has the authority and duty to require the Court of Appeals to correct this error. (Rule 38, U. S. Supreme Court Rules). *Erie RR Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938); *Klaxton Co.* v. *Stentor Electric Manufacturing Co.,* 313 U. S. 487, 61 S. St. 1020, 85 L. ed. 1477 (1941). The Court of Appeals in its decision in this case is directly in conflict with the Circuit Court of Appeals of the Seventh Circuit. *Reed* v. *Kelly,* 177 Fed. 2d 473, C. A. 7 (1949).

If there was any question about the clarity of the local

law in this case the District Court should have granted the timely motion of petitioner that the proceedings be suspended until an authoritative decision upon the statute itself in a local court could be obtained. See opinion of Mr. Justice Frankfurter in *Sutton* v. *Leib,* 342 U. S. 402, 72 S. Ct. 398, 96 L. ed. 448, 458 (1952); also *Driscoll* v. *Edison Power & Light Co.,* 307 U. S. 104, 59 S. Ct. 715, 83 L. ed. 1134 (1938); *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 60 S. Ct. 628, 84 L. ed. 876 (1939); *American Federation of Labor* v. *Watson,* 327 U. S. 582, 66 S. Ct. 761, 90 L. ed. 873 (1946).

In striking the pleadings of the petitioner and in entering summary judgment for respondent, the District Court and the Court of Appeals denied petitioner the right to prove that the contract sued upon was invalid because it was in violation of the Florida Real Estate License Law which, with applicable local decisions, was the declared public policy of Florida. This defense should have prevented the District Court from awarding judgment for the respondent and the Court of Appeals having sustained this error the exercise of the supervisory jurisdiction of this court is required. *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938); *Klaxton Co.* v. *Stentor Electric Manufacturing Co.,* 313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941).

The above matters are substantial because respect for these principles by the Federal District Courts and Courts of Appeal is essential to the preservation of the constitutional relationship which exists between our federal and state judicial systems.

Questions Presented

1. Did the U. S. Court of Appeals err in holding that respondent, a New York corporation, could recover judg-

ment against the petitioner, a citizen of Florida in the U. S. District Court for the Southern District of Florida:

(a) Where the contract under which recovery was sought provided that petitioner should pay respondent a brokerage fee if the Florida land described in the contract belonging to petitioner was sold by anyone (and such land was sold by someone other than respondent); and

(b) Where at the time such contract was entered into between petitioner and respondent and at the time the action was instituted in Florida by respondent the president of respondent was not qualified as required by Florida law as an active real estate broker; and

(c) Where the Florida Real Estate License Law prohibited the recovery of a brokerage fee respecting Florida land by a corporation all of whose active officers had not qualified as active real estate brokers in Florida and such statute with applicable local decisions was the declared public policy of Florida?

2. Since no Florida court would have entered judgment for respondent in this case because such judgment would have been contrary to the Florida real estate license law, was it in error for the Court of Appeals to affirm the District Court, having jurisdiction because of diversity of citizenship alone, entering such judgment?

3. Was it error for the District Court if it had any doubt about the local law to deny a timely motion by petitioner that the proceedings be suspended until a clear decision expressing local law could be obtained and was it not error for the Court of Appeals to affirm such motion?

4. Was it not error for the Court of Appeals to affirm the District Court in striking the defenses of petitioner that judgment for respondent was contrary to the declared public policy of Florida and entering summary judgment for respondent?

Reasons Relied on for the Allowance of the Writ

1. The Florida Real Estate License Law, with applicable local decisions, declared the public policy of Florida that a corporation could not recover a brokerage fee for the sale of Florida real estate unless at the time of the contract sued upon the corporation had qualified all of its active officers as active real estate brokers in Florida. No Florida court would have allowed recovery to respondent which had not complied with this statute in this case. The Court of Appeals was in error in affirming the District Court sitting in Florida and having jurisdiction only on the ground of diversity of citizenship, in entering judgment of recovery for respondent. In its decision affirming the District Court, the Court of Appeals thus has decided an important question of local law in conflict with the declared policy of Florida.

2. The Court of Appeals erred in affirming the judgment of the District Court striking the defenses of petitioner that the contract sued upon was invalid under Florida law and recovery by respondent in the District Court was contray to the declared public policy of Florida, and entering summary judgment for respondent.

3. The decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the decision of the Court of Appeals for the Seventh Circuit on the same matter. *Reed* v. *Kelly*, 177 Fed. 2d 473, C. A. 7 (1949). The conflict should be resolved by this court.

The settlement of these principles is of importance to the public. It is not for federal courts to deprive states of the right to pursue their own policies.

WHEREFORE, it is respectfully submitted that this petition should be granted.

CLAUDE PEPPER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 751

PEARL PEARCE,

Petitioner,

v.

PREVIEWS, INCORPORATED,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Report of Opinions Delivered in the Courts Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 201 F. 2d 385 and appears on pages 29-31 of the Transcript of Record. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit appears on page 31 of the Record and its order denying rehearing on page 41 of the Record. The final judgment of the United States District Court of the Southern District of Florida, Tampa Division, appears on pages 20-21 of the Record.

Grounds on Which the Jurisdiction of This Court Is Invoked

The jurisdiction of the Supreme Court is invoked upon U. S. C., Title 28, Section 1254 (1).

The exercise of the jurisdiction of the Supreme Court is invoked upon the following grounds:

1. The Court of Appeals in this case has decided an important question of local law in a way probably in conflict with applicable local authority.

2. The Court of Appeals for the Fifth Circuit has in this case rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter.

Statement of the Case

The essential facts of the case have been more fully stated in the accompanying petition.

This case began in the U. S. District Court for the Southern District of Florida as a suit to recover the balance alleged to be due of a brokerage fee claimed by the Respondent, a New York corporation, on account of a sale of Florida real estate. (R. 1). The president of the corporation, J. C. Tysen, in New York accepted and signed the contract for the corporation with the petitioner, a citizen and resident of Florida. (R. 5). The New York corporation, through its president (Tysen), undertook to list the property of the petitioner with real estate brokers generally "and to handle all sales negotiations"; to transmit offers to petitioner, to prepare and distribute the description of the property to brokers and to make arrangements for the sale of it to such brokers; to submit information regarding the property to both brokers and prospective buyers; to solicit active and intelligent selling interest among brokers by news letters, correspondence and personal discussion; to select a broker active in the neighborhood of the property for the purpose of handling inquiries from distant brokers; to act in petitioner's "behalf in all negotiations"; and to perform other duties. (R. 4, 5, 6, 7). The respondent, the

New York corporation, did not sell the property but sued upon a clause in the contract providing that it should collect a 10% commission whoever sold the property. (R. 2).

Respondent prepared brochures concerning the petitioner's property and transmitted such brochures to real estate brokers in Florida from both its New York and its Florida offices. (R. 11). On its brochures distributed in Florida from its New York and Florida offices, respondent held itself out as the broker for the sale of this property and offered to arrange for an inspection of it through either its New York office or its Florida office.

After the property was sold by another, respondent sued petitioner for the balance of the alleged brokerage commission due in the U. S. District Court for the Southern District of Florida. Petitioner, defending the action, pleaded that the president of the plaintiff was not qualified as an active real estate broker in Florida and that the respondent corporation had committed acts in Florida pursuant to said contract which brought the contract within the terms of the Florida Real Estate License Law and by the provisions of such statute providing that a brokerage contract for the sale of Florida real estate was not valid at the instance of a corporation unless such corporation had qualified as active real estate brokers in Florida all of its officers who had anything to do with the transaction in question. Petitioner pleaded that because President Tysen of respondent had participated in the transaction by signing the contract and the corporation had committed acts covered by the Florida Real Estate License Law in Florida, and President Tysen was not qualified as an active real estate broker in Florida, the respondent could not recover under the contract. The court below struck these pleas of the petitioner (R. 8, 9, 10, 11, 12, 14). Petitioner also pleaded in the District Court that the statute in question had not

been passed upon by any Florida court in respect to the particular issue raised in this case, and moved the District Court that proceedings therein be suspended until a declaratory judgment under the Florida Law could be obtained construing the Florida Real Estate License Law with respect to the issue of this case. (R. 18, 19). This motion was denied by the District Court. (R. 20). The District Court thereupon issued summary and final judgment for the respondent. (R. 20, 21).

The Circuit Court of Appeals for the Fifth Circuit affirmed the above decisions of the District Court on January 29, 1953 and on February 16, 1953 denied petitioner's petition for re-hearing. (R. 31, 41).

Specification of Errors

1. The District Court erred in striking the pleas of the petitioner, denying the motion of the petitioner for stay of proceedings and entering summary and final judgment for respondent.

2. The Court of Appeals erred in affirming the above orders and judgment of the District Court and in refusing to reverse the same.

Summary of Argument

1. The affirmance by the Court of Appeals of a judgment by the District Court in Florida for the respondent in this case was in violation of the prohibition of the Florida Real Estate License Law and therefore in conflict with the local law, which, being the law of the forum, should have been applied in this case.

2. The decision of the Court of Appeals (for the Fifth Circuit) in this case is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter.

3. If the District Court required a decision of a Florida Court to support the clear language of the Florida Real Estate License Law as the public policy of Florida upon the subject matter, the District Court should have granted the timely motion of petitioner that proceedings be suspended until an authoritative decision of the Florida court could be obtained.

4. The Court of Appeals should not have affirmed the judgment of the District Court striking petitioner's pleas that a statute declaring the public policy of Florida forbade recovery by the respondent and entering summary and final judgment against the petitioner.

ARGUMENT

1. The Affirmance by the Court of Appeals of a Judgment by the District Court in Florida for the Respondent in this Case Was in Violation of the Prohibition of the Florida Real Estate License Law and Therefore in Conflict With the Local Law, Which, Being the Law of the Forum, Should Have Been Applied in this Case.

Florida enacted its first Real Estate License Law in 1923, just on the eve of the Florida "boom" (Laws of Florida 1923, c. 9177). This Act was extended in 1925 as the "boom" reached its crest. (Laws of Florida 1925, c. 10233 and 11336). These Acts in turn were extended into the present law (475.01-475.46, Florida Statutes 1951) enacted in 1927. (Laws of Florida 1927 c. 12223). The pertinent parts of this Act to the case are set out in the Appendix.

Section 475-41 F.S. 1951 provides:

> "No contract for a commission or compensation for any act or service enumerated in subsection (2) of Section 475.01 shall be valid unless the broker or salesman shall have complied with this Chapter in regard to registration and renewal of the certificate at the time the act or service was performed."

Section 475.42(a) F.S. 1951 provides:

> "No person shall operate as a real estate broker or salesman without being the holder of a valid current registration certificate."

Sub-section (2) of Section 475.01 F.S. 1951, which describes the acts or services the performance of which makes one a broker or salesman under the Act, insofar as it is pertinent to the issues here, provides as follows:

> "Every person who shall, in this state, for another, and for a compensation . . . offer, attempt or agree to . . . negotiate the sale . . . of any real property; or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of . . . selling . . . real estate; and every person who shall take any part in the procuring of . . . purchasers . . . of the real property . . .; or who shall direct or assist in the procuring of prospects, or the negotiation or closing of any transaction which . . . is calculated to result in a sale . . . and who shall . . . be promised any compensation . . . directly or indirectly therefor; and all persons who are . . . officers . . . of corporations engaged in performing any of the aforesaid acts or services; each and every such person shall be deemed and held to be a real estate broker."

Sub-section (3) of the same section provides as follows:

> ". . . and all officers . . . of a corporation, which . . . corporation is defined by said subsection to be a real estate broker, shall be deemed and held to be operating as real estate brokers;"

Sub-section (4) of the same section requires brokers to register but says:

> "Registration alone shall not entitle the registrant to operate as a broker or salesman."

Sub-section (10), same section, provides that a certificate of registration shall be issued to each broker when he or it has registered and paid the required fee, and that:

> "Such certificate, *except non-active certificate,* shall authorize the holder to act as a broker or salesman until the date of expiration or until the registration is revoked or suspended." (Italics ours)

Section 475.02 F.S. 1951 establishes a Real Estate Commission consisting of three persons, and specifies their duties and powers.

Section 475.13 F.S. 1951 requires every broker to renew his or its registration annually, and that those who register as active brokers shall pay an annual registration fee, and that:

> "No collector or county judge shall issue any real estate occupational license except upon presentation of an active registration certificate for that year."

Section 475.15 F.S. 1951 provides:

> "Every partnership and corporation required to be registered, shall register and annually renew the certificate of its members, officers and directors."

Section 475.17 F.S. 1951 requires that each person (including officers and directors of corporations) who applies for registration

> "must make it appear that he is 21 years of age, a citizen of the United States, honest, truthful, trustworthy, of good character, and that he bears a good reputation for fair dealing. An applicant for active broker's registration or salesman's registration shall be required to make it appear that he is competent and qualified to make real estate transactions and conduct and negotiate therefor with safety to investors and to those with whom he may undertake a relationship of trust and confidence."

This section also requires that the broker must not have had a previous license revoked or suspended, or——

> "been guilty of conduct or practice in this state or elsewhere, which would have been ground for revoking or suspending registration,"

This sub-section specifically provides that:

> "The foregoing qualifications apply to members, partners, officers and directors of a corporation."

Section 475.16 requires that:

> "Every person shall make application for registration in the form required by the rules of the Commission and shall answer such questions and furnish such supporting affidavits as may be required by the Commission touching his qualifications."

Section 475.19 provides that natural persons (which includes corporate officers) shall be examined personally by the Real Estate Commission respecting their qualifications, and authorizes the Commission to approve the application if and when it is satisfied with the qualifications of the applicant.

It is clear that if the contract in question in this case had been executed in Florida and if the services rendered had been all performed in Florida the respondent would have been engaged in Florida in the business of a real estate broker and the respondent could not have recovered in any Florida court any commission or compensation for such services without fully complying with this Act, including the qualification as active real estate brokers of all of its active officers. By the contract (R-4, 5, 6 and 7) the respondent undertook *"to promote the sale of"* the Florida property of petitioner by its usual sales management methods; "to list the property" on behalf of petitioner

"and *to handle all sales negotiations;*" "to transmit offers" to petitioner;" to study "the factors affecting the saleability of the property to determine the most effective methods of offering it for sale"; to offer "the property in Previews news letters to appropriate groups of brokers"; to recommend a "suitable price and terms of offering at client's request"; to prepare "illustrated descriptions of the property"; to distribute "the illustrated descriptions to appropriate lists of brokers selected by Previews, and" (to notify) "them that the property is for sale on a 5% commission basis"; to supply "additional copies of the illustrated descriptions to all approved brokers who request them"; to submit "information regarding the property in response to suitable inquiries from brokers *and prospective buyers";* to solicit "active and intelligent selling interest among real estate brokers by news letters, correspondence, and personal discussion, etc."; to select "a broker active in the neighborhood of the property, for the purpose of handling inquiries from distant brokers, directing other brokers to the property, *and performing other services helpful to a sale";* to inform "brokers of any physical changes in the property, revision of price or terms, tax or mortgage changes, etc., which owner may advise"; *to act "in client's behalf in all negotations and (to transmit) all bona fide offers to the client";* to be "at all times available to the client for discussion of his problem and" (to advise) "on the acceptance or rejection of offers". (Italics ours).

There can be no doubt that by the agreement respondent for compensation did "agree to . . . negotiate the sale" of the property in question by agreeing in its contract "to handle all sales negotiations" and to act "in client's behalf in all negotiations" (475.01(2) F.S. 1951). Nor can there be any doubt that the respondent did by the advertisements

which it agreed to distribute, and which the stricken pleas of petitioner in this case showed it did distribute in Florida, come within the literal terms of the language "or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of . . . selling . . . real estate." Surely what the respondent did made it "one who took any part in the procuring of . . . purchasers . . . of the real estate". Certainly the agreement undertaken by respondent and the acts performed by it brought it within the category of one "who shall direct or assist in the procuring of prospects, or the negotiation or closing of any transaction which . . . is calculated to result in a sale". (475.01 (2) F.S. 1951)

The agreement undertaken by the respondent and the service performed by respondent generally and in Florida bringing the respondent within the coverage of the Act would have required the respondent to have qualified *all* of its officers as active real estate brokers in Florida before it would have so complied with the statute as to enable it to enter into a valid and enforceable "contract for a commission or compensation for any act or service enumerated in sub-section (2) of section 475.01" unless some officer should be exempted from the requirement of qualification as an active broker by the provisions of Section 475.14 F.S. 1951. This section provides that:

> "Any member of a partnership or officer or director of a corporation, *who does not desire to do or perform any of the acts or services enumerated* in sub-section (2) of Section 475.01 and any registered broker who *desires to preserve his registration* during a period while not engaged as a broker, may apply for and receive a certificate as a non-active broker. All other certificates shall be deemed active." (Italics ours)

This section which came first into the Florida Real

Estate License Law in 1927 obviously was intended to exempt a member of a partnership or officer or director of a corporation who is a totally inactive member of a real estate brokerage company or whose duties in the organization are completely unconnected with any of the ordinary functions of a real estate broker. The exemption in the case of a corporation applies only to an "officer . . . of a corporation, who does not desire to do or perform *any* of the acts or services enumerated in sub-section (2) of Section 475.01." One of the acts which makes one a real estate broker under the statute in Section 475.01(2) is "for another, and for a compensation (to) agree to . . . negotiate the sale . . . of any real property." The agreement upon which respondent sues obligated it "to promote the sale" and "to handle all sales negotiations." President Tysen is the one who signed this agreement as president of respondent. It was presumably under his direction as president of the corporation that all the other acts done by respondent in this case were performed. He therefore, having signed the agreement which gave rise to the claim of respondent, the very basis of respondent's suit, and having directed the corporation to do everything that it has done in the case for which it seeks recovery, can surely not claim that he was a complete stranger to this transaction and totally remote from it. He was no innocent bystander in the initiation or execution of this contract and presumably he is the executive officer of the company who directed the suit to be instituted in this case. So he is still actively participating so far as the record shows in this contract he signed. It would seem odd that he could claim the full benefit of the contract for his corporation and at the same time be heard to deny all personal responsibility for participation in its undertaking or its execution.

Our conclusion is based upon the decision of the Florida Supreme Court upon language similar to that in the present law in a 1925 statute. In the case of *State ex Rel. Baskin et al.* v. *Bird,* 90 Fla. 335, 105 So. 821 (1925) a suit was brought by the State of Florida on behalf of Baskin and Davis for mandamus to direct the County Judge to issue for J. D. Baskin Real Estate a broker's license. The writ was demurred to upon the ground, among others, "that it affirmatively appears that W. A. Davis has not tendered to respondent the license fee required by the law before a license can be issued to the realtors as copartners 'because Section 12 of Chapter 10233 of the Laws of Florida (the Florida Real Estate License Law of that time) has not been complied with, in that the said J. D. Baskin and the said W. A. Davis do not hold or have not applied for individual licenses as real estate brokers, and until each of said parties shall hold or apply for a real estate license as brokers, and pay or tender unto this respondent the sum of $18.00 for broker's license for each of them, and the sum of $18.00 for said copartnership, said respondent cannot accept and consider an application for the said parties as copartners doing business as "J. D. Baskin Real Estate,"' ". *State ex rel. Baskin et al.* v. *Bird,* 90 Fla. 335, 105 So. 822 (1925).

Section 12 of Chapter 10233 Laws of 1925 provided as follows:

> "No copartnership, association or corporation shall be granted a license unless every member or officer of such copartnership, association or corporation who actively participates in the brokerage business of such copartnership, association or corporation, shall hold a license as a real estate broker, and every employee who acts as a salesman shall hold a license."

The Court, through West, C. J., said:

> "As far as this case is concerned, there can be no question of the meaning of Section 12. Before a partnership is entitled to a real estate broker's license, 'every member . . . of such copartnership . . . shall hold a license as a real estate broker.' The writ admits noncompliance with this statute. The partner, W. A. Davis, had not applied for a broker's license for himself, although admittedly actively participating in the brokerage business in which the copartnership was engaged."
>
> *State ex rel. Baskin et al.* v. *Bird,* 90 Fla. 335, 105 So. 822, 823 (1925).

The lower court which granted the writ was reversed.

Mr. Tysen, then, by this decision would be regarded by the Supreme Court of Florida as an active participant in the real estate brokerage business of respondent, and in this particular transaction, would have been required to qualify as an active real estate broker in Florida before his corporation could recover a brokerage fee upon a contract he executed.

If Tysen had met the standards of integrity and competence of the Florida Real Estate Commission, his residence in New York would not have prevented his qualifying, for the language of the 1927 Act requiring Florida residence as a condition to qualification was declared unconstitutional and ineffective by the Supreme Court of Florida in the case of *State* v. *Rose,* 97 Fla. 710, 122 So. 225, 238 (1929).

So the exception makes no difference in this case, and the respondent was obligated by the clear language of the Act to qualify President Tysen before the respondent could recover the commission claimed under the contract which President Tysen negotiated and signed for the company.

But the Court of Appeals does not base its opinion affirming the District Court granting a summary judgment

under the contract to respondent upon President Tysen having nothing to do with this contract and Tysen coming under the exemption from Section 475.01. The Court bases its decision entirely upon its conception that the Act applied only to acts under Section 475.01 performed in Florida. Since in the opinion of the Court none of the acts performed by or attributable to President Tysen were performed in Florida, the Act did not require the qualification of President Tysen as an active real estate broker. The language of the Act which leads the Court to this conclusion consists of the words "in this state" appearing in Section 475.01(2).

This narrow construction of the statute totally overlooked the long history and the salutary purpose of the Florida Real Estate License Law.

In *Holland* v. *Florida Real Estate Commission* the Supreme Court of Florida, through Chapman, J., quoted with approval the following language of a justice in an earlier case interpreting the purpose and intention of the Florida Real Estate License Law now under consideration:

> "The purpose of the statute under consideration is to stabilize real estate transactions and to protect the public against financial loss through future repetition of unscrupulous practices in transactions involving the sale and purchase of real estate. Experiences of the recent past in Florida have demonstrated that the methods followed by many in such dealings, without the restraint of this statute, have readily adapted themselves to the perpetration of deception and imposition. See Goldstein *v.* Maloney, 62 Fla. 198, 57 So. 342; People *v.* Beaks Dairy Co. (222 N.Y. 416), 119 N.E. (115), 118, 3 A.L.R. 1267. The statute attempts to accomplish the result stated by permitting only those who posses certain special qualifications of aptitude, ability, and integrity to engage in the business of real estate broker.

> "'In his fiduciary relationship to his customer, the broker invites, and usually receives, a high degree of confidence and trust, in the bestowal of which it is competent for the state to protect the customer by reasonable regulations upon the broker.' "
>
> *Holland* v. *Fla. Real Estate Commission* 130 Fla. 590, 178 So. 121, 122 (1938)

Later the Supreme Court of Florida, through Terrell, J., in speaking of the obligation of the real estate broker under the Florida statute, said:

> "The real estate business has become a highly specialized one and the real estate broker is now the confidant of the public in much the same manner as the lawyer and the banker. His relation to the public exacts the highest degree of trust and confidence and the law imposes on appellees (the Florida Real Estate Commission) the duty of enforcing its standards."
>
> *Ahern* v. *Florida Real Estate Commission,* 149 Fla. 706, 6 So. 2d 857, 858 (1942).

The Court of Appeals totally ignored the statute in question as an authoritative declaration of public policy of the State of Florida, and that the suit in question was in the forum of Florida governed by Florida law and public policy.

The Act was carefully examined section by section in 1929, two years after its enactment, by the Supreme Court of Florida and found to be wholly consistent, except as to the one provision requiring an active real estate broker to be a resident of Florida, with the Constitution of Florida and the Constitution of the United States.

State v. *Rose,* 97 Fla. 710, 122 So. 225, 238 (1929).

Such a statute does not violate the due process provisions of the United States Constitution. *Bratton* v. *Chandler,* 260 U.S. 110, 67 L. ed. 157, 43 S. Ct. 43, 67 L. ed. 157 (1922). Nor does it violate the commerce clause of the United States Con-

stitution. To the contention that a similar statute (one requiring brokers representing out of state insurance companies to have a state license) violated the commerce clause because it interfered with interstate business, this Court, through Mr. Justice Rutledge, said:

> "We accept the regulation for what it purports to be on its face by the statute's express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship.
> ". . . Such being the purpose and effect of Section 1642, there can be no substantial question concerning its validity on commerce clause grounds."
> *Robertson* v. *California*, 328 U.S. 440, 66 S. Ct. 1160, 90 L. ed. 1366, 1373 (1946).

The statute has been sustained by a long line of cases since in Florida. *Holland* v. *Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121 (1938). *Zichlin* v. *Dill*, 157 Fla. 96, 25 So. 2d 4 (1946).

The Court of Appeals cites in support of its position *Land Co. of Fla.* v. *Fetty*, 15 Fed. 2d 942 (1926). In that case a suit was brought by a plaintiff in the United States District Court of Georgia seeking to recover an agreed commission for his finding a purchaser for Florida land for the defendant. The defendant pleaded that the contract was void under the Florida Real Estate License Law of 1923 (Laws of 1923, Chapter 9177). That law defined a real estate broker as follows:

> "A real estate broker, within the meaning of this act, is any person, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale of real estate for others, as a whole or partial vocation. One act for a

> compensation of buying or selling real estate of or for another, or offering for another to buy or sell real estate, shall constitute the person performing, or attempting to perform, any of the said acts, a real estate broker within the meaning of the Act."
>
> *Land Co. of Fla.* v. *Fetty,* 15 F. 2d 942.

This was a very narrow statute and not comparable to the statute in question here.

The Court of Appeals found that:

> "Plaintiff was first approached by defendant as a prospective purchaser in Savannah, Georgia. And, after stating that he was not interested in buying, was employed to find a purchaser. . .
>
> "When plaintiff procured a purchaser ready, able, and willing to buy, he had complied with his contract. *McGavock* v. *Woodlief,* 20 How. 221, 15 L. Ed. 884. In view of the facts we do not think the contract of employment between plaintiff and defendant could be considered as governed by the laws of Florida."

That suit being in a District Court in Georgia upon a contract entered into in Georgia, it was the duty of the Court to follow the law of the forum, Georgia, not the law of Florida. So the facts being different, the statute being different, the forum being different, it cannot sustain the Court of its authorship in ignoring the Florida Real Estate License Law held valid by the highest court of Florida when it was pleaded as a defense in a United States District Court in Florida where the land which was the subject of the suit lay.

Since it is clear that the Florida Real Estate Law was valid and authoritative as a declaration of public policy in Florida, no Florida court would have enforced the respondent's contract in violation of that statute.

This has long been a settled rule in Florida. In *Robert*

G. Lassiter and Co. v. *Taylor*, 99 Fla. 843, 128 So. 14, 19 (1930) the Supreme Court of Florida said:

> "We now have before us a case where the contract was made in violation of a mandatory provision of the charter, which requires such contracts to be let to the lowest responsible bidder. We quite agree with the Supreme Court of California, when it says: 'This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent: for to permit this would be for the law to aid in its own undoing. Says the supreme court of the United States in President, etc. (of Bank of United States) *v.* Owens, 2 Pet. 527 (7 L. Ed. 508): "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in Coppell *v.* Hall, 7 Wall. 542 (19 L. Ed. 244), says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." ' "

This strong statement of Florida policy regarding an illegal contract was affirmed in *Citizens Bank and Trust Co.* v. *Mabry*, quoting most of the above language. 102 Fla. 1084, 136 So. 715, 717 (1931).

In *Mott* v. *First Nat. Bank*, 98 Fla. 444, 124 So. 36, 37 (1929) the Supreme Court of Florida held that Florida

would recognize the relation of parent and child having been competently established by adoption in Connecticut "unless such statutes or the rights flowing therefrom are not contemplated by or are repugnant to the laws or policy of the State of Florida upon the subject."

In *Kellogg-Citizens Nat. Bank* v. *Felton,* 145 Fla. 68 199 So. 50 (1940) a suit was brought in Florida against a married woman domiciled in Florida upon certain promissory notes delivered by her in the State of Wisconsin. Judgment by default was rendered against the married woman and her husband. The husband died. On the motion of the widow the lower court quashed the judgment against the married woman, then a widow. "Question One" presented to the Court in that case was this:

> "Is it contrary to the public policy of Florida to enforce a contractual liability of a married woman upon a promissory note validly made and binding at the place and time of its execution, where there has been no change in the agreement save for an extension of the time of payment by renewal?".
>
> *Kellogg-Citizens Nat. Bank* v. *Felton,* 145 Fla. 68, 199 So. 51 (1940)

The Court affirmed the lower court quashing the judgment through presiding Justice Whitfield who, referring to a quoted Wisconsin statute where married women had complete freedom of contract with men, said:

> "There is no statute of that nature in the State of Florida. The common law disabilities of married women are only partially removed in this state. The public policy of the state on this subject in Florida is controlled by the constitution and pertinent statutes of the States. . . .
>
> "Under the common law in force in this state a married woman cannot by contract bind herself for personal liability; and a promissory note executed by her cannot

be enforced against her as a personal liability unless she is a free dealer under the statutes of Florida."

And the Court added, quoting from an earlier Florida case:

" 'The extent and scope to which the rule of comity will operate is not universal but will be determined by each sovereignty under the controlling facts of the particular case.' ".

Kellogg-Citizens Nat. Bank v. *Felton*, 199 So. 52, 53.

It is the clear weight of authority that other states will not enforce real estate brokerage contracts in violation of the state law and policy. *Knight* v. *Watson*, 221 Ala. 69, 127 So. 841 (1930); *Davis* v. *Chipman*, 210 Cal. 609, 293 P. 40 (1930); *Pratt* v. *Sloan*, 41 Ga. App. 150, 152 S. E. 275 (1930) [where a Georgia Court construed the Florida statute as we do here]; *Bendell* v. *De Dominicis*, 251 N.Y. 305, 167 N.E. 452 (1929); *Owens* v. *Capri*, 202 P. 2d 174 (Wyo.) (1949).

The Court of Appeals should have reversed the District Court and directed it to apply the Florida law in this case since it is the settled duty of the Federal courts sitting in a given state where the Federal court has jurisdiction only by diversity of citizenship, to apply the local law and public policy.

Erie R. Co. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938); *Klaxton Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941).

2. The Decision of the Court of Appeals (for the Fifth Circuit) in this Case Is in Conflict With the Decision of the Circuit Court of Appeals for the Seventh Circuit on the Same Matter.

The decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the decision of the Cirsuit Court of Appeals for the Seventh Circuit on the same

matter. The same matter decided by the Court of Appeals for the Fifth Circuit in this case was decided directly to the contrary, and, we submit, correctly, by the Court of Appeals for the Seventh Circuit in *Reed* v. *Kelly*, 177 Fed. 2d 473, C.A. 7 (1949), affirming a judgment of the United States District Court in Wisconsin.

In this case the Court of Appeals for the Seventh Circuit through Kerner, J., said:

> "Plaintiff, a resident of Illinois, sued the defendant, a resident of Wisconsin, to recover a commission for procuring a purchaser for defendant's property. The complaint alleged that the plaintiff was a duly licensed real estate broker in the State of Illinois; that defendant, of Chicago, Illinois, listed her Superior, Wisconsin property for sale at a sales price of $300,000.00, "and promised plaintiff a commission of 5% of the sales price for his services in procuring a purchaser. The plaintiff obtained an offer in writing from one Mitchell to purchase the property for $300,000.00. The defendant in violation of her promise rejected the offer.,
>
> "Because plaintiff was not licensed to sell real estate in Wisconsin, defendant moved that the complaint be dismissed on the ground that it did not state a claim upon which relief could be granted. The Court sustained the motion and dismissed the complaint. To reverse, plaintiff appealed.
>
> "Section .02 of Chapter 136 of the Wisconsin statutes prohibits anyone from following the business, temporarily or otherwise, of a real estate broker in Wisconsin without first procuring a license. Section .11 of the same statute declared that no person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within the State of Wisconsin shall bring or maintain an action in the courts of Wisconsin for the collection of a commission or compensation for the performance of any of the acts mentioned in Chapter 136 without alleging and proving that such person was a duly licensed real estate broker or real estate salesman at the time the alleged

cause of action arose. Section .28 of the statute prohibits anyone engaged in the business or acting in the capacity of business opportunity broker or business opportunity salesman within the State of Wisconsin from bringing or maintaining an action in the courts of that state for the collection of a commission without alleging and proving that such person was a duly licensed business opportunity broker or business opportunity salesman at the time the alleged cause of action arose.

"Plaintiff makes no claim that the statute in question is void, but contends that it has no extra-territorial effect. He argues that the statute is intended to regulate only real estate brokers operating within the State of Wisconsin, and since his contract was entered into and performed in Illinois, the statute is inapplicable.

"It is preferred, as a general rule, that the *lex loci* govern as to the validity of contracts, but this rule is subordinate to and is qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a state be set at naught. *The Kensington,* 183 U.S. 263, 269, 22 S. Ct. 102, 46 L. Ed. 190. A state may refuse to enforce a contract which provides for doing within it acts prohibited by its laws. *Boxwell* v. *Buckbee Mears Co.,* 275 U.S. 274, at 728, 48 S. Ct. 124, 72 L. Ed. 277. And in an action to enforce a remedy the law of the forum applies and not the law of the place of the making or performance of the contract. *Scudder* v. *Union Nat. Bank,* 91 U.S. 406, 413, 23 L. Ed. 245. That is to say, a citizen of one state cannot use the courts of a sister state to prosecute his cause of action in a manner contrary to the laws of the forum. *Walton School of Commerce* v. *Stroud,* 248 Mich. 85, 226 N.W. 883, at 885; *Mt. Ida School for Girls* v. *Rood,* 253 Mich. 482, 23 Law. Ed. 245, 235 N.W. 227, 74 A.L.R. 1325; and *Transit Bus Sales* v. *Kalamazoo Coaches,* 6th Cir. 145 Fed. 2d 804, and it appears that the courts of Wisconsin would refuse to enforce plaintiff's contract because he was not a licensed real estate broker in Wisconsin, the Federal courts

must do likewise. *Griffin* v. *McCoach*, 313 U.S. 498, 507, 61 Sup. Ct. 1023, 85 L. Ed. 1481, 134 A.L.R. 1462.

"It is clear that the Wisconsin statute prohibits anyone from following the business, temporarily or otherwise, of a real estate broker in Wisconsin without first procuring a license, and positively prohibits one so engaged from bringing an action for commissions in her courts. Here it is conceded that the plaintiff has never been licensed as a real estate broker in Wisconsin. True, the contract in question was executed in Chicago but it relates to plaintiff procuring a purchaser for defendant's property in Wisconsin. In such a situation, would the courts of Wisconsin refuse to enforce the contract? We think they would. A somewhat analogous question was considered and decided in *Levy* v. *Birnschein*, 206 Wis. 486, 240 N.W. 140, at 141, except that it does not appear whether the broker in that case was doing business without or within Wisconsin. The court held that there must be allegation and proof that plaintiff was a 'duly licensed real estate broker or real estate sales man at the time the alleged cause of action arose' and 'If he did not have a license, no enforceable obligation arose in his favor out of the transaction.'

"We conclude that since the enforcement of plaintiff's claimed contract is forbidden by the positive law of Wisconsin, the trial court did not err in dismissing the complaint."

Reed v. *Kelly*, 177 Fed. 2d 473, C.A. 7 (1949)

The two cases are indistinguishable respecting the character and effect of the statutes involved. The United States District Court in each case sat in the state where the statutory prohibition was in effect. The Circuit Court of Appeals of the Fifth Circuit ignored the effect of the statute of Florida barring the action in this case as a matter of public policy. The Circuit Court of Appeals of the Seventh Circuit gave full effect to the Wisconsin statute barring recovery in the District Court as a matter of public policy.

It is submitted that the Seventh Circuit was correct; but the two courts are in conflict and certiorari should issue in this case so that the conflict may be resolved by this court and the rule of *Erie RR. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) and *Klaxton Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) be clarified and enforced in respect to this type of case.

3. If the District Court Required a Decision of a Florida Court to Support the Clear Language of the Florida Real Estate License Law as the Public Policy of Florida Upon the Subject Matter, the District Court Should Have Granted the Timely Motion of Petitioner that Proceedings be Suspended Until an Authoritative Decision of the Florida Court Could Be Obtained.

The statute of Florida was clear in forbidding recovery in this case because the president of the respondent was not qualified as an active broker in Florida. The Florida statute had been upheld by the Supreme Court of Florida. And the principle that the Florida courts would not enforce a contract which was either illegal or contrary to the public policy of Florida had been many times declared by the Florida Supreme Court when this case was decided by the District Court and the Court of Appeals. But there had been no decision by the Florida Supreme Court at the time the District Court and the Court of Appeals rendered their decisions on the specific question involved in this case. Fearing that the District Court, in the absence of a Florida Supreme Court decision directly in point, would presume to construe the statute *de novo* so as not to give effect to the public policy of Florida, petitioner before the final judgment of the District Court moved "the Court to suspend further proceedings in said cause and to retain jurisdiction

of the complaint for a reasonable time to afford an opportunity to obtain, by appropriate action, a construction of said statute by the courts of the State of Florida." (R-19). The District Court denied this motion, struck the defendant's pleas, and entered summary judgment for the respondent. (R. 20, 21). The Court of Appeals ignored the motion but affirmed the judgment of the District Court. (R-31).

The motion of petitioner in the District Court was in accord with the opinion of Mr. Justice Frankfurter as to what should be done by a Federal court which does not have a state decision to guide it in a diversity case. Where the Court of Appeals for the Seventh Circuit passed *de novo* upon an Illinois statute Mr. Justice Frankfurter said:

> "I would remand the case to the Court of Appeals to be held by it until the plaintiff seeks with all deliberate speed a decision on the crucial question of the case in the Illinois courts."
>
> *Sutton* v. *Leib*, 342 U.S. 402, 72 S. Ct. 398, 96 L. ed. 448, 458 (1952)

See also *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 60 S. Ct. 628, 84 L. ed. 876 (1940).

4. The Court of Appeals Should Not Have Affirmed the Judgment of the District Court Striking Petitioner's Pleas That a Statute Declaring the Public Policy of Florida Forbade Recovery by the Respondent and Entering Summary and Final Judgment Against the Petitioner.

It was through her pleas in the District Court that the petitioner raised her defense that the respondent could not recover because it had not complied with the Florida Real Estate License Law and to allow recovery would violate the declared public policy of Florida. (R-8, 9, 10, 11, 12). Likewise, in her motion (R-18, 19) petitioner sought to

raise directly the question that recovery by respondent would violate the declared public policy of Florida. The District Court struck petitioner's pleas (R-14) and denied peitioner's motion (R-18). Thus the District Court, which the Court of Appeals affirmed, denied to petitioner the right to raise as a defense the public policy of Florida when Florida was the forum of the suit, or held that the District Court could properly allow recovery even if it did violate, as the plea and the motion alleged, the declared public policy of Florida. If the former is the effect of the affirmed District Court decision, it is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. If the effect of the decision is the latter, it is an instance of the Court of Appeals for the Fifth Circuit affirming a decision of a District Court on an important question of local law in a way probably in conflict with applicable local decisions. And this course clearly violates the rule in *Erie RR. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) and *Klaxton Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941).

Conclusion

This is simply a case wherein the Court of Appeals for the Fifth Circuit has fallen into the error of affirming a District Court decision in Florida in a diversity of citizenship case contrary to the public policy of Florida which is a matter of public interest and can only be corrected by the issuance of a Writ of Certiorari by this Court.

Wherefore, Petitioner prays that the Writ may duly issue.

Respectfully submitted,

CLAUDE PEPPER,
Counsel for Petitioner.

APPENDIX "A"

FLORIDA STATUTES, 1951

"Chapter 475—Real Estate License Law"

475.01—Definition of terms used in chapter—

"(1) This chapter may be referred to in any legal proceeding as the "Real Estate License Law."

"(2) Every person who shall, in this state, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraise, auction, sell, exchange, buy or rent, or offer, attempt or agree to appraise, auction or negotiate the sale, exchange, purchase or rental of any real property, or any interest in or concerning the same, including mineral rights or leases; or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing or renting real estate, or interests therein, including mineral rights or leases, of others; and every person who shall take any part in the procuring of sellers, purchasers, lessors or lessees of the real property, or interests therein, including mineral rights or leases, of another; or who shall direct or assist in the procuring of prospects, or the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who shall receive, expect, or be promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who are members of partnership or officers or directors of corporations engaged in performing any of the aforesaid acts or services; each and every such person shall be deemed and held to be a "real estate broker" or a real estate salesman," as hereinafter classified, unless said person when performing the act or acts herein specified shall be acting

as an attorney-in-fact for the purpose of the execution of contracts or conveyances only, or as an attorney-at-law within the scope of his duties as such, or when acting as the administrator, executor, receiver, trustee, or master under or by virtue of an appointment by will or by order of a court of competent jurisdiction, or as trustee under a deed of trust, or under a trust agreement, the ultimate purpose and intent whereof shall be charitable, philanthropic, or providing for those having a natural right to the bounty of the donor or trustor; nor shall the term broker or salesman be applied to a person who shall deal with property in which he is a part owner, unless said person shall receive a larger share of the proceeds of profits from the transaction than his proportional investment therein would otherwise justify, such excess share being directly or indirectly the result of the service of buying, selling, exchanging or leasing said property; nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by-laws, if said corporation shall not otherwise be classed as a real estate broker or salesman.

"(3) Every person who comes within the meaning of the preceding subsection, and shall not be within the exceptions named, and whose business policies and acts are free from the direction, control or management of another person, and all members of a partnership, and all officers and directors of a corporation, which partnership or corporation is defined by said subsection to be a real estate broker, shall be deemed and held to be operating as real estate brokers; and every other person who shall come within the terms "real estate broker" or "real estate salesman," as defined in the preceding sub-section, shall be deemed and held to be operating as real estate salesmen.

"(4) "Registration" shall consist of the placing and keeping of the name and business address, and if of a salesman, the name and business address of the em-

ployer also, upon the list of brokers and salesmen in the offices of the Florida real estate commission, with the appropriate designation as "broker" or "salesman." said "registration list" shall be kept in books, or in files, as may be deemed expedient by the commission. Registration shall be in force for a period of six months after the expiration of the last certificate issued, or after the termination of any period of suspension, and no longer; but registration alone shall not entitle the registrant to operate as a broker or salesman.

"(5) A "registrant" is a person whose name and business address, and in case of a salesman, the name and business address of the employer also, has been placed, and lawfully remains, on said registration list, and said term shall not include any person who has not applied for a renewal certificate within the aforesaid period of six months.

"(6) The "license year" shall be the fiscal year ending at midnight, the thirtieth day of September of each year.

"(7) A "registered broker" shall be any person who is a registrant under this chapter and who has been classified as a real estate broker. All other registrants shall be "registered salesmen."

"(8) The word "Commission," when used in this chapter shall refer to the Florida real estate commission, except when obviously used in some other sense.

"(9) Where the phrase "members, officers and directors of a partnership or corporation," or similar phrase is used in this chapter, the word "members" shall be deemed to refer to partnership only, and not to stockholders in a corporation.

"(10) The word "certificate" or "registration certificate" shall be deemed to mean a written instrument, prepared according to the regulations and bearing the seal of the commission, which shall be issued to every broker or salesman as soon as registration is granted, and renewed annually thereafter as long as renewals thereof shall be granted, and which shall be prima

facie evidence that the holder is a registrant, and that the registration fee for the license year expiring next after the date of issuance which shall be indorsed thereon, has been paid. Such certificate, except nonactive certificate, shall authorize the holder to act as a broker or salesman until the date of expiration, or until the registration is revoked or suspended."

475.02 Florida real estate commission; terms; organization; quorum—

"There is created the Florida real estate commission, to consist of three persons, resident citizens of the State of Florida, to be appointed by the governor, each of whose vocation for at least ten years prior to his appointment shall have been that of real estate broker.

"The members of the commission shall serve until the expiration of the term for which they shall have been appointed and until their successors shall have qualified. The term of office shall be three years; that of one member shall expire each year, and upon the death, resignation or removal of a member, his successor shall be appointed for the unexpired portion of his term. As the new member is appointed each year, the commission shall reorganize and select a chairman from its number, who shall be the executive officer of said commission, and a secretary. Two members of the commission shall constitute a quorum to do business."

475.13 Registration and annual renewal thereof required; fees—

"Every person deemed and held to be a real estate broker or real estate salesman under the terms of this chapter shall be required to register with the commission, and to secure a registration certificate annually. The fee for registration of real estate brokers, and the annual renewal of registration certificates, shall be ten dollars each; for registration and annual renewal certificates of nonactive brokers, one dollar

each; for registration of real estate salesmen and annual renewal certificates, five dollars each. No collector or county judge shall issue any real estate occupational license except upon presentation of an active registration certificate for that year. No fee shall be returned to an applicant after the application shall be received by the commission."

475.14 Nonactive brokers

"Any member of a partnership or officer or director of a corporation who does not desire to do or perform any of the acts or services enumerated in sub-section (2) of §475.01 and any registered broker who desires to preserve his registration as a broker, may apply for and receive a certificate as a non-active broker. All other certificates shall be deemed active."

475.15 Annual registration of certificates of members or firm, etc., required—

"Every partnership and corporation required to be registered shall register, and annually renew the certificates of its members, officers and directors; and the registration of such partnership or corporation shall be suspended automatically during any period of time that certificates of all of its members, officers or directors shall not be in force."

475.16 Application for registration—

"Every person shall make application for registration in the form required by the rules of the commission, and shall answer such questions and furnish such supporting evidence as may be required by the commission, touching his qualifications."

475.17 Qualifications of applicants for registration—

"An applicant for registration who is a natural person shall be required to make it appear that he is twenty-one years of age, a citizen of the United States, honest, truthful, trustworthy, of good character, and

that he bears a good reputation for fair dealings. An applicant for an active brokers' registration or a salesman's registration, shall be required to make it appear that he is competent and qualified to make real estate transactions and conduct negotiations therefor, with safety to investors and to those with whom he may undertake a relationship of trust and confidence. An applicant for a salesman's registration shall show that he is a bona fide resident of the State of Florida, and an applicant for an active broker's registration shall show that he has been such a resident for one year immediately prior to the filing of the application. If it shall be made to appear that the applicant has been denied registration or a license or has been disbarred, or his registration or license has been revoked or suspended, by this or any other state or nation, or possession or district of the United States, or any court or lawful agency thereof, to practice or conduct any regulated profession, business or vocation, because of any conduct or practices which would have warranted a like result under this chapter, or that the applicant has been guilty of conduct or practices in this state or elsewhere, which would have been grounds for revoking or suspending registration under this chapter had the applicant then been registered, the applicant shall be deemed not to be qualified, unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient it shall appear to the commission that the interest of the public and investors will not likely be endangered by the granting of registration. The foregoing qualifications apply to members of partnerships and officers and directors of corporations. A corporate applicant shall have been organized under, or be legally qualified to do business in, the State of Florida."

475.19 Approved applicants to be examined by commission—

"When the application for registration of any natural person, not being then registered, shall be approved,

the applicant shall be required to appear in person, at a time and place to be designated by the commission, and answer questions touching his qualifications according to the provisions of this chapter. The operation of this section may be postponed by the commission until such time as it may be practicable to put it in force.

475.41 Contracts of unregistered person for commissions invalid—

"No contract for a commission or compensation for any act or service enumerated in subsection (2) of §475.01 shall be valid unless the broker or salesman shall have compiled with this chapter in regard to registration and renewal of the certificate at the time the act or service was performed."

475.42 Violations and penalties—

"(1)" VIOLATIONS.—(a) No person shall operate as a real estate broker or salesman without being the holder of a valid current registration certificate."

"(2) PENALTIES.—Any person who shall violate any of the provisions of this section shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not more than six months, or if a corporation, by a fine of not less than one hundred dollars nor more than one thousand dollars, except where a different punishment is prescribed by the chapter."

"(3) DEFINITIONS.—

"(a) Wherever the words "operate" or "operating" as a broker or a salesman shall appear in this chapter, or in any order, rule or regulation of the commission, or in any pleading, indictment or information, under this chapter, or in any court action or proceeding, or in any order or judgment of a court, it shall be deemed to mean the commission of one or more acts described in § 475.01(2) and § 475.01(3) as constituting or defining a real estate broker or salesman, not in-

cluding however, any of the exceptions stated therein. A single such act shall be sufficient to bring a person within the meaning of this chapter, and each act shall if prohibited herein, constitute a separate offense."

475.45 Construction of chapter—

"This chapter is declared to be remedial, and it is intended that the same shall be liberally construed in order to accomplish such remedial purpose and correct the evils and abuses at which it is directed. If any word, phrase, clause, sentence or section of this chapter shall be declared unconstitutional or otherwise invalid or unenforceable, either absolutely or as applied to any person or circumstance, the remainder of the chapter shall not be thereby rendered unconstitutional, invalid or unenforceable, nor shall any portion of the chapter be affected as to other people or circumstances.

Chapter 205—License Taxes

205.01 Occupational license taxes; county judge's fee—

"No person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless a state license, or a state and county license, or county license, as the case may be, shall have been procured from the tax collector of the county where the place of business may be located, or where the profession or occupation may be engaged in, or from the comptroller or state treasurer, as is provided by this chapter or other law of this state, which license shall be issued to each person upon receipt of the amount hereinafter provided, or as may be otherwise provided by law, and in case the license is issued by the tax collector, he must collect in addition thereto the county judge's fee of twenty-five cents for each county license signed by him, and such license shall be signed by the tax collector and the county judge and shall have the county judge's seal thereon.

205.52 Professions—

"Every person engaged in the practice of any profession, whether or not such profession be regulated by law, shall pay a license tax of ten dollars for the privilege of practicing, which license tax shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him. This section shall include real estate brokers but no license shall be required by their salesmen."

205.65 Doing business without license—

"Any person who shall carry on or conduct any business or profession for which a license is required, without first obtaining such license shall, except in such cases as are otherwise provided for by law, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than double the amount required for such license, or imprisonment not exceeding six months.

(7928)

FILED
JUN 8 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1952

No. 751

PEARL PEARCE, *Petitioner,*

v.

PREVIEWS, INCORPORATED, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MANLEY P. CALDWELL
MADISON F. PACETTI
H. ELMO ROBINSON
Counsel for Respondent.

WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

INDEX

Subject Index

PAGE

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2–3

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3–5

ARGUMENT 6

I. Summary 6–7

II. The Construction of the Statute was Clearly Correct and Not in Violation of the Florida Law 8–14

III. There Is No Conflict of Decision 14–16

IV. The District Court Properly Refused to Abdicate 16–22

CONCLUSION 22–23

Table of Cases Cited

American Federation of Labor v. *Watson*, 327 U.S. 582, 66 S. Ct. 761, 90 L. ed 873 (1946) 18

Ahern v. *Florida Real Estate Commission*, 149 Fla. 706, 6 So. 2d 857 (1942) 9

Bratton v. *Chandler*, 260 U.S. 110, 43 S. Ct. 43, 67 L. ed. 157 (1922) 9

Citizens Bank and Trust Co. v. *Mabry*, 102 Fla. 1084, 13 So. 715 (1931) 9

Driscoll v. *Edison Power & Light Co.*, 307 U.S. 104, 59 S. Ct. 715, 83 L. ed. 1134 (1938) 17

Erie R. Co. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) 10, 20

Holland v. *Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121 (1938) 9

Huddleston v. *Dwyer*, 322 U.S. 232, 64 S. Ct. 1015 (1944) 21

PAGE

Kellogg-Citizens Nat. Bank v. *Felton*, 145 Fla. 68, 199 So. 51 (1940) 9
Klaxton Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941) 10
Land Co. of Florida v. *Fetty*, 15 F. 2d 942 (1926) 12, 14
Markham v. *Allen*, 326 U.S. 490, 66 S. Ct. 296 (1946) 21
Meredith v. *City of Winter Haven*, 320 U.S. 228 64 S. Ct. 7 (1943) 19
Mott v. *First Nat. Bank*, 98 Fla. 444, 124 So. 36 (1929) 9
Propper v. *Clark*, 337 U.S. 472, 69 S. Ct. 1333 (1949) 21
Reed v. *Kelly*, 177 F. 2d 473, C.A. (1949) 14
Robert G. Lassiter and Co. v. *Taylor*, 99 Fla. 843, 128 S. 14 (1930) 9
Robertson v. *California*, 328 U.S. 440, 66 S. Ct. 1160, 90 L. ed. 1366 (1946) 9
Spiegel's Estate v. *Commissioner*, 335 U.S. 701, 69 S. Ct. 301 (1949) 21
State ex rel. Baskin et al v. *Bird*, 90 Fla. 335, 105 So. 822 (1925) 9
State v. *Rose*, 97 Fla. 710, 122 So. 225 (1929) 9
Sutton v. *Leib*, 342 U.S. 402, 72 S. Ct. 398, 96 L. ed. 448 (1952) 18
Thompson v. *Magnolia Petroleum Co.*, 309 U.S. 478, 60 S. Ct. 628, 84 L. ed. 876 (1939) 17
Williams v. *Green Bay Co.*, 326 U.S. 549, 66 S. Ct. 284 (1946) 21
Zichlin v. *Dill*, 157 Fla. 96, 25 So. 2d 4 (1946) 9

Statutes and Other Authorities Cited

Federal Rules of Civil Procedure, Rule 56 5
Florida Statutes, 1951, Chap. 475 ..... 2, 3, 10, 13
Florida Statutes, 1951 475.01 3
Florida Statutes, 1951 475.13 3
Florida Statutes, 1951 475.14 ..... 3, 11
Florida Statutes, 1951 475.41 ..... 3, 12
Laws of Florida, 1923 Chap. 9177 12
Rules of The Supreme Court of the United States, Rule 38(5) 2, 22
United States Code, Title 28, par. 1254(1) 2

Supreme Court of the United States

October Term, 1952

No. 751

PEARL PEARCE, *Petitioner,*

v.

PREVIEWS, INCORPORATED, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

This case originated in the United States District Court for the Southern District of Florida. There was no opinion of the District Court. The decisive ruling was an order entered March 17, 1952, striking Petitioner's affirmative defenses. (R. 14). Thereafter this ruling was confirmed by final judgment on motion for summary judgment, entered June 30, 1952. (R. 20).

The unanimous opinion of the United States Court of Appeals for the Fifth Circuit, on appeal from the final judgment was filed January 29, 1952. (R. 29-31). Petition for rehearing was denied February 25, 1953. (R. 41). These are reported at 201 F (2d) 385.

JURISDICTION

The jurisdiction of this Court is based upon Title 28, Section 1254(1), United States Code, providing that cases in the Courts of Appeal may be reviewed by this Court by writ of certiorari.

However, the jurisdiction to grant the writ of certiorari sought is discretionary and no basis appears for exercise of the discretionary jurisdiction.

None of the "special and important reasons" for the issuance of the writ, prescribed by Rule 38(5) of this Court exist. The petition is merely a "last ditch effort of Petitioner to avoid paying a Fifteen Thousand Dollar debt, which two Federal Courts have on four occasions determined that she owes Respondent.

For this purpose, Petitioner seeks to divert the time and attention of this Court from urgent national issues to review the new construction of a State Statute, based on an undisputed set of facts, by the District Court and Court of Appeals, in the exercise of their diversity of citizenship jurisdiction.

QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals for the Fifth Circuit, in a diversity of citizenship case, involving approximately $15,000, that the proper construction of the Florida Real Estate License Law, Chapter 475 Florida Statutes, is that the President of a New York real estate corporation, who was not a resident of Florida, need only qualify as a non-active broker under this Florida Statute, where he did not perform any acts in Florida, and where the corporation and the person performing all of the pertinent acts in Florida were qualified under the Statute as active brokers, there

being no pertinent or relevant decision of the Florida State Courts on the point, and there being no pertinent or relevant conflicting decision of another United States Court of Appeals?

STATUTE INVOLVED

The State Statute involved is Chapter 475 Florida Statutes, 1951 (hereinafter referred to by abbreviation as F. S.), especially Sections 475.01, 475.13, 475.14 and 475.41 thereof.

The material portions of this Statute are set forth in the Appendix of the Petition and Brief of Petitioner herein, page 37, et seq.

STATEMENT OF THE CASE

This suit involves the attempt of Respondent, who was Plaintiff in the District Court and Appellee in the Court of Appeals, to collect from Petitioner, who was Defendant in the District Court and Appellant in the Court of Appeals, the principal amount of Thirteen Thousand Five Hundred Dollars for breach of a real estate sales promotion contract.

Respondent is a New York corporation, qualified to do business in Florida as a foreign corporation. At the relevant times, it had a branch office in Palm Beach, Florida, under the charge of B. Randolph Shaffer, Jr., a regional vice president. It was registered as an active broker under the Florida Real Estate License Law, Chapter 475 F.S. Mr. Shaffer was registered as an active broker under this law, and John C. Tysen, its President, was registered under this law as a non-active broker. Mr. Tysen was a non-resident of Florida. (R. 9-11).

Petitioner and Respondent entered into a contract for the promotion of the sale of property in Florida belonging to Petitioner, under the terms of which Respondent agreed to do a number of things conducive to the promotion of such sale, and Petitioner agreed to pay Respondent 10% of the sale price of the property, no matter who brought about the sale. A deposit was paid in the amount of Fifteen Hundred Dollars, to be credited upon the final fee due under the contract.

The contract was signed on behalf of Respondent in New York by its President, Mr. Tysen. (R. 5). All necessary acts and services by Respondent in Florida in connection with the contract were performed by Mr. Shaffer, its Florida Vice-President. (R. 31).

Several months after the contract was entered into, the property was sold for One Hundred and Fifty Thousand Dollars. Respondent demanded payment of its fee of 10% of the sale price, Fifteen Thousand Dollars, less the deposit of Fifteen Hundred Dollars, a net principal amount of Thirteen Thousand Five Hundred Dollars. Petitioner refused this demand and the present suit was brought by Respondent in the District Court for the Southern District of Florida. The jurisdiction of the Federal Court was based upon diversity of citizenship, Petitioner being a Florida resident, Respondent a New York corporation, and the requisite amount in controversy existing. (R. 13).

The pertinent defense asserted by Petitioner, was based upon the contention that Respondent had not complied with the Florida Real Estate License Law, because its President, Mr. Tysen, was registered only as a non-active broker, and that hence the contract was invalid.

Respondent moved to strike this defense as being insufficient, immaterial and irrelevant. The District Judge granted this motion. (R. 13-14).

Respondent then moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact, that the above affirmative defense had been adjudicated insufficient and that Respondent was entitled to a judgment as a matter of law. Filed with the motion was the affidavit of Mr. Shaffer in support of the allegations of the complaint, the material ones of which had been admitted in the Answer. (R. 14-17).

At the hearing on the motion for summary judgment Petitioner for the first time moved that further proceedings in the cause be suspended for a reasonable time to obtain a construction of the Statute by the Florida State Courts. (R. 18, 19). This motion was denied. (R. 20).

The District Court entered a final judgment on the summary judgment motion for the full relief sought by Respondent, finding that there was no genuine issue as to any material fact, that the defense in the answer was insufficient as a matter of law, and that Respondent was entitled to a judgment as a matter of law. (R. 20-21).

Petitioner then appealed to the Court of Appeals for the Fifth Circuit from this final judgment, accompanied by supersedeas. (R. 21-26). After the case had been submitted on briefs and oral argument, the Court of Appeals unanimously affirmed the final judgment and entered judgment of affirmance. (R. 29-32).

Petitioner then filed a petition for rehearing, in which she argued with the Court of Appeals as to the correctness of its opinion. (R. 33-40). This petition for rehearing was summarily denied. (R. 41).

The pending petition for writ of certiorari was thereupon filed, seeking to review the opinion and judgment of the Court of Appeals.

ARGUMENT

I.

Summary

The issue of the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

There is no constitutional question involved in the opinion of the Court of Appeals sought to be reviewed. There is no Federal question so involved.

There is now involved merely the construction of a Florida State Statute by the District Court and the Court of Appeals, acting in pursuance of their jurisdiction to determine controversies between citizens of different States, and in the absence of a construction of the Statute by the Florida State Courts.

Nor are the facts upon which the construction is based such that a ruling by this Court would be of importance to others as a precedent. It is unlikely that the combination of facts existing in the case at bar would ever occur again. It is improbable that there would be another effort to defeat the claim of a real estate firm for compensation for its services on the ground that its President, who performed no services in Florida, was registered as a non-active broker, although the corporation and its officer, who had performed all of the services in Florida, were fully qualified active brokers under the Florida Statute.

Even the amount involved, above Fifteen Thousand Dollars, is not sufficiently important to warrant this Court in adding consideration of this matter to its heavy docket of cases of national and financial importance.

Petitioner, in her Petition and Brief (P. 10, 14) assigns three reasons for review of this case:

1. That the Court of Appeals ruling was in violation of the Florida Real Estate Law and therefore in conflict with the local law of Florida.

2. That this ruling is in conflict with a decision of the Court of Appeals for the Seventh Circuit.

3. That, after having preliminarily determined the decisive legal question against Petitioner, the District Court should have abdicated its jurisidction, at the request of Petitioner, and permitted the question to be redetermined by the State Courts.

Briefly summarized, our replies to the foregoing contentions are:

1. The Statute involved had never been construed by any Court, State or Federal, as to the point involved herein. The Court below did not violate the local law and did not disregard it. They merely determined what is the local law on the particular question. An analysis of the Statute demonstrates that the construction placed upon it by the Courts below was entirely correct.

2. There is no conflict of the decision herein, with the decision of the Court of Appeals for the Seventh Circuit, relied upon by Petitioner. An analysis of the Seventh Circuit case shows clearly that it involved an entirely different Statute from the one involved in the case at bar, and the question here presented was not remotely present in the Seventh Circuit case.

3. Respondent had the right under the laws of the United States to bring this suit in the Federal Courts and to obtain their ruling thereon. No reason is shown why the District Court should have abdicated its jurisdiction and thus penalize Respondent for starting this suit in the jurisdiction of its choice.

We shall now consider in detail each of these purported reasons for the granting of the writ.

II.

The Construction of the Statute Was Clearly Correct and Not in Violation of the Florida Law

Petitioner contends that the writ should be granted because the Court of Appeals decision was in violation of the Florida Real Estate License Law and therefore in conflict with the local law. (Peto. Br. 15). She further contends that the Court in so ruling violated the public policy of Florida. (Peto. Br. 35).

In her argument on this point, Petitioner illustrates the fallacy of logic known as "begging the question". She assumes that the Florida Statute does invalidate the contract involved, and proceeds from such premise to the conclusion that the refusal of the Court of Appeals to declare the contract invalid was in violation of Florida law.

The very purpose of the construction of the Statute by the Court was to determine whether the Florida law had or had not been violated. When the Court construed the Statute in the manner it did, it found the contract did not violate the local law.

Petitioner utterly fails in her argument to support her sweeping statements that the Florida law has been determined adverse to the ruling of the Court of Appeals. The authorities cited by her set forth glittering generalities so far as the present issue is concerned, but none of them are remotely connected with the point determined herein.

In other words, by her argument on this point, Petitioner has sought "to lift herself by her bootstraps", with the inevitable result of such an effort.

Turning to a brief consideration of the authorities cited by Petitioner on this point, we find that they are as follows:

State ex Rel Baskin et al v. *Bird,* 90 Fla. 335, 105 So. 821 (1925) (Peto. Br. 22), merely holds that both members of a two man partnership must apply for broker's licenses to entitle one to a license.

State v. Rose, 97 Fla. 710, 122 So. 225, 238 (1929) (Peto. Br. 23), upheld the constitutionality of a prior Florida Real Estate License Law, against attack on various grounds, none here pertinent.

Holland v. Fla. Real Estate Commission, 130 Fla. 590, 178 So. 121, 122 (1938) and *Ahern v. Florida Real Estate Commission,* 149 Fla. 706, 6 So. 2d 857, 858 (1942), (Peto. Br. 25), simply interpret the purpose and intent of the Statute, in no manner in conflict with the decision here.

Bratton v. Chandler, 260 U.S. 110, 67 L. ed 157, 43 S. Ct. 43, 67 L. ed. 157 (1922) (Peto. Br. 25) and *Robertson v. California,* 328 U.S. 440, 66 S. Ct. 1160, 90 L. ed. 1366, 1373 (1946) (Peto. Br. 26), were decisions of this Court on constitutional questions relating to Statutes of States other than Florida on entirely different subject matters.

Zichlin v. Dill, 157 Fla. 96, 25 So. 2d 4 (1946) (Peto. Br. 26), simply again upholds the general validity of the Act.

Robert G. Lassiter and Co. v. Taylor, 99 Fla. 843, 128 So. 14, 19 (1930) (Peto. Br. 27, 28), *Citizens Bank and Trust Co. v. Mabry,* 102 Fla. 1084, 136 So. 715, 717 (1931) (Peto. Br. 28), *Mott v. First Nat. Bank,* 98 Fla. 444, 124 So. 36, 37 (1929) (Peto. Br. 28) and *Kellogg-Citizens Nat. Bank v. Felton,* 145 Fla. 68, 199 So. 50 (1940) (Peto. Br. 29), are decisions on subjects far afield from the construction of the Florida Real Estate License Law, e.g., Statutes relating to bidding on contracts, bank stock assessments, parent and child relationships, and married women's notes respectively.

The cases from States other than Florida cited (Peto. Br. 30) are no help at all in supporting her contention that the Court of Appeals decision violated the Florida local law.

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) and *Klaxton Co. v. Stentor Electric Mfg. Co.* 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), (Peto. Br. 30), are merely decisions of this Court holding that Federal Courts should follow the established local law as determined by the State Courts. In the case at bar there are no rulings nor pertinent decisions of the State Courts—no established local law on the point involved.

There being no decisions, prior to the determination herein, construing the Statute in question, we turn to the Statute itself to see its bearing on Petitioner's defense.

It seems clear to us that the proper construction of the Real Estate License Law is that Respondent's President, J. C. Tysen, was not required to be registered as an active real estate broker in Florida in order to do the only thing in connection with the transaction which Petitioner charges him with, the execution of the contract in New York. It does not appear from the record that anything was done in regard to the contract by any person other than B. R. Shaffer, who was a registered active Florida real estate broker, except the signing of the contract by Mr. Tysen.

Petitioner's brief contains as an appendix the material portions of this Real Estate License Law, Chapter 475 F. S., and reference will be made to the Statute as quoted in this appendix in our discussion of this subject. (Peto. Br. 37, et seq.).

After declaring the name of the law, the Statute in Section 475.01 defines the scope covered by it, stating

that every person who shall IN THIS STATE do the various things in relation to the sale of real estate described, including all persons who are officers or directors of corporations engaged in performing any of these acts or services, shall register as brokers or salesmen. (Peto. Br. 37). (Italics and caps used in this Brief are supplied unless otherwise indicated.)

The Statute further provides in Section 475.14 that an officer or director of a corporation who does not desire to do or perform any of the acts or services enumerated in the above discussed portion of the Statute, may apply for and receive a certificate as a non-active broker. (Peto. Br. 41).

It seems clear that Mr. Tysen did not do nor perform any of said acts or services, because, under the Statute, to bring an act or service within its scope, such act or service must be done or performed *"in this State"*, meaning in Florida. Mr. Tysen signed the contract in New York and not in Florida.

And, as pointed out above, the corporation was qualified as an active broker and the person who did all of the acts in Florida that were done, was an active broker, Mr. Shaffer. Mr. Tysen was a non-active broker, because he did not desire to do or perform any of these acts referred to in the Statute, in Florida.

Accordingly, the Statute is properly construed to mean that Respondent can operate in Florida through its active resident broker, Mr. Shaffer, and that it is sufficient for its President to be registered as a non-active broker, since he does not do or perform any acts nor services *"in this State"*. This conclusion is strengthened by the fact that Respondent itself, as a corporate entity, was not only qualified to do business in Florida, but was registered as an active broker.

Attention is called to the fact that the principal difference between an active broker's registration and a non-active registration is that the former costs $10.00 and the latter costs $1.00. (Petro. Br. 40). In other words, this distinction is principally that of a revenue measure. It would have been a harsh construction, indeed, to hold that Respondent must forfeit the fee of $13,500, to which it is entitled under the contract, and that Petitioner can be enriched by that amount, simply because the State of Florida received only $1.00 on Mr. Tysen's registration instead of $10.00.

Section 475.41, upon which appellant principally relies, states that no contract for a commission or compensation for any act or service enumerated in the defining portion of the Statute, shall be valid unless the broker shall have complied with the Statute in regard to the registration. (Peto. Br. 43). Respondent had so complied with the chapter. It was registered as an active broker, in its corporate capacity; the only person who performed any act or services in Florida was registered as an active broker, Mr. Shaffer, and Mr. Tysen was sufficiently registered as a non-active broker because he did not do or perform any act or service *"in this State"*.

It appears pertinent to cite in this connection *Land Co. of Florida* v. *Fetty*, 15 Fed. (2d) 942, decided by the Court of Appeals for the Fifth Circuit in 1926. In that case the Court of Appeals held that the Statute which preceded the present Real Estate License Law, which was Chapter 9177, Laws of Florida for 1923, did not apply where the plaintiff had entered into a contract in Georgia and had performed no services in regard to a real estate brokerage contract in Florida. The previous Statute, as does the present one, invalidated a brokerage contract where the broker had not complied with the Real Estate License Law. The plaintiff in the Fetty case had not so

complied, yet he was permitted to receive his commission because he performed no services in Florida with reference to the subject matter of the contract.

Accordingly, we submit that the proper construction of the Statute is that Respondent has properly complied therewith through its own registration and that of Mr. Shaffer, and by the registration of Mr. Tysen, who did not act in Florida, as an inactive broker.

The Court of Appeals fully sustained the foregoing principles. Its holding on this point is brief, and is quoted here, for the convenience of this Court. (R. 30-31).

> "It appears that the corporate appellee, as well as its regional vice-president in charge of its Florida office, was registered as an active broker under the Florida Real Estate License Law (Chapter 475, Florida Statutes). The other officers and directors of the corporation, including the corporate president, were registered under Florida law as non-active brokers (Chapter 475, Florida Statutes).
>
> The Florida Real Estate License Law provides that "Every person who shall, *in this state,* (italics by the Court) for another, and for a compensation * * * sell, exchange, buy or rent * * * any real property, * * * and all persons who are members of partnerships or officers or directors of corporations engaged in performing any of the aforesaid acts or services * * *" (emphasis supplied) shall register as brokers or salesmen. Properly construed, this statute did not require appellee's president and the other non-resident officers to hold active real estate broker's licenses from the State of Florida, since they did not do or perform any acts or services relating to the property "in this State". The signing of the contract by appellee's president was in New York and not in Florida. Appellee, as a corporate entity, was qualified to do business in Florida and was registered as an active broker, as was its Florida Vice-President, who, so far as appears, performed all necessary acts and services in Florida in connection with this contract. Under such circumstances, the district court properly

> entered a summary judgment for appellee, on the ground that there was no genuine issue as to any material fact and that the defenses urged were insufficient as a matter of law. See *Land Co. of Florida vs. Fetty,* 15 F. 2d 942."

It thus appears that Petitioner's contentions that the writ should be issued and that this unique and relatively unimportant case should consume the time of this Court, because the lower courts in some manner violated the local law, and were in conflict with the Florida Real Estate License Law, is a shadow without substance and is utterly without foundation. The Statute had not been previously construed and the District Court and the Court of Appeals logically and properly construed it in declaring Respondent entitled to recover that which Petitioner by her solemn contract had agreed to pay.

III.

There Is No Conflict of Decision

Petitioner claims that there is a conflict between the decision of the Court of Appeals for the Fifth Circuit in the case at bar, and a decision by the Court of Appeals for the Seventh Circuit. (Peto. and Br. 10, 12, 14, 30-34).

This contention illustrates the desperate lengths to which Petitioner goes in grasping at straws in order to avoid being required to pay her obligation.

The two decisions are no wise in conflict, nor do they involve the same subject matter.

The Seventh Circuit case referred to, *Reed* v. *Kelly,* 177 Fed. 2d. 473, was a suit between two *individuals.* It was brought by Phillip Reed doing business as P. H. Reed & Company against Irma B. Kelly. No corporation nor corporate question was involved. Reed sued in the Federal Court in Wisconsin for a commission which he

claimed Kelly owed him for work done in Illinois. Reed was not licensed in Wisconsin as a broker and his right to commission was denied, because he was not so licensed.

In the case at bar, the suit was brought by Previews, Incorporated, a New York *corporation*. This corporation was and is licensed as an active Florida broker. The question was whether this corporation's President was required by the Florida Statute to be a registered active broker.

The Reed case involved *application* of the provisions of a Wisconsin Statute; the case at bar involves *construction* of the provisions of a Florida Statute. The Wisconsin Statute was entirely lacking in any of the corporation provisions upon which Petitioner here relies. It provided that *no person* shall bring action for compensation as a real estate broker or salesman without alleging and proving *that such person* was duly qualified as such.

Were the Florida Statute the same as the Wisconsin Statute, the question here involved would not have arisen, and the Petitioner would not even have the technical defense which she here seeks to assert. Respondent did allege and prove that it was duly licensed as an active real estate broker. The question arises with respect to other provisions of the Florida Statute as to which the Wisconsin Statute is entirely lacking.

The conclusion of the Court was that since the enforcement of plaintiff's claim to a contract was forbidden by the positive law of Wisconsin, plaintiff could not recover. Here the question determined was whether the positive law of Florida did forbid enforcement of the contract. As hereinabove pointed out, the positive law of Florida did not forbid such enforcement and the District Court and the Court of Appeals properly so held.

It thus appears that the two cases are clearly distinguishable respecting the character and effect of the

two different Statutes involved. The Court of Appeals herein did not ignore the effect of the Florida Statute but construed it as not affecting Respondent's claim. The Court of Appeals for the Seventh Circuit applied an entirely different Statute, involving entirely different facts, to entirely different principles.

It thus appears that no basis for issuance of the writ exists because of the fancied conflict advanced by Petitioner.

IV.

The District Court Properly Refused to Abdicate

Petitioner contends in her Petition and Brief (Pet. and Br. 7, 8, 15, 34-35) that if the District Court required a decision of a Florida State Court to construe the Statute, it should have granted Petitioner's motion that proceedings in this case be suspended until a Florida State Court decision could be obtained.

As this question is phrased, it would seem a sufficient answer to it that obviously the District Court was in very little doubt as to the clear construction of the Statue, and did not require nor need the help of a State Court to enable it to exercise its diversity of citizenship jurisdiction. The District Court delivered no opinion in the case and its order striking Petitioner's defense was brief, merely striking the defense without assigning reasons (R. 14). The Court likewise found it unnecessary to discuss the legal principles in its final judgment (R. 20). Apparently, the District Court did not find the question troublesome.

Moreover, it appears that Petitioner did not raise in the Court of Appeals this question, nor there complain about the denial by the District Court of her motion to suspend proceedings. This is apparent from the failure of the Court of Appeals to refer to this point, (R. 29-31),

although the opinion obviously covers each of the points raised by Petitioner on appeal.

However, we do not rest our reply to this point presented by Petitioner in the instant application for the writ on the above factors alone, but assert, that it appears clearly that the District Court followed the principles also on this point, enunciated by this Court.

We further assert that each of the authorities cited by Petitioner in support of this contention is not in point and does not support Petitioner's contention. We shall first consider the cases cited by Petitioner and then demonstrate the controlling authorities.

Driscoll v. *Edison Power & Light Co.*, 307 U. S. 104, 59 S. Ct. 715, 83 L. ed. 1134 (1938) (Peto. Br. 8), actually supports our contention rather than the point for which it is cited. In that case, this Court did not refer the issues to the State Court for decision, but held that since the conclusion of the lower court in construing the State Statute was not supported by a State decision, this Court would analyze for itself the provisions of the applicable Statute. We are at a loss to understand how this decision can possibly be considered to support the argument that the District Judge in the case at bar should have referred the issue herein to the State Courts.

In *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 60 S. Ct. 628, 84 L. ed 876 (1939) (Peto. 8, Br. 35), the jurisdiction of the Federal Court was founded upon the Bankruptcy Act. A question of the construction of the State law was involved and the Court held that the issue should be submitted to a State Court for determination. Subsequent decisions of this Court demonstrate that this decision was based upon the circumstance that bankruptcy was involved and constitutes an exception to the general rule hereinafter demonstrated.

Likewise, *American Federation of Labor* v. *Watson*, 327 U. S. 582, 66 S. Ct, 761, 90 L. ed. 873 (1946). (Peto. 8), which, incidentally, also originated in Florida, involved exceptional circumstances. There, an effort was made to enjoin enforcement of a new Florida constitutional provision relating to labor unions and the closed shop. This Court referred the matter for construction by the State Courts of these constitutional provisions. It assigned as its reason therefor that the construction of the State Court might be such as to avoid the necessity for the determination by this Court of the Federal constitutional questions raised. This Court held that since it was uncertain what constitutional issues would emerge as the result of an authoritative construction by the State Courts, such a constructmion should first occur. Because of the public interest and constitutional questions involved in the Watson case, it constitutes no precedent for the action in the case at bar, involving only private litigants and their rights, and relating only to a simple construction of a non-complicated statute.

Petitioner also refers to the opinion of Mr. Justice Frankfurter in *Sutton* v. *Leib,* 342 U. S. 402, 72 S. Ct. 398, 96 L. ed 448, 458 (1952) (Peto. 8, Br. 35), in which he stated that the case should be remanded to the Court of Appeals to be held until a decision of the State Courts could be obtained. However, this opinion was not that of the Court, but only of a single Justice. The remainder of the Court (except Mr. Justice Black, who dissented on another ground) held that the Court of Appeals should proceed to determine the question of State Law there involved.

Coincidentally, the leading recent case on this point also originated in Florida, and involved a decision of the Court of Appeals for the Fifth Circuit, the same Court from which the pending petition for writ of certiorari is brought. In fact, it arose in the same District

Court in which the case at bar originated, the District Court for the Southern District of Florida. This decision is *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 64 S. Ct. 7 (1943).

This suit involved a question of law relating to a bond refunding. The Court of Appeals for the Fifth Circuit found that it was in doubt as to the applicable Florida law and ordered dismissal of the suit without prejudice to plaintiff's right to proceed in the State Court. On certiorari, this Court reversed the Court of Appeals, and held that it should determine the questions of State law and should not have abdicated its jurisdiction because of the difficulty of the questions.

In reaching its conclusion this Court stated in opinion by the late Chief Justice Stone:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in *exceptional* cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. * * * When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.
>
> *"The exceptions relate to the discretionary powers of courts of equity.* * * *
>
> "But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all

diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. * * * Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. *To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.*

"Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

The italicized language in the paragraph next to the preceding one is particularly applicable to the facts of this case.

Respondent brought this suit in the Federal Court under the right to do so granted to it by Congress. The litigation has been pending since August 1951. Petitioner would have us start all over again in a new forum. This would certainly "penalize Respondent for resorting to a jurisdiction which it was entitled to invoke".

The Meredith case has been followed in a number of subsequent decisions. Some of them are *Huddleston* v. *Dwyer*, 322 U. S. 232, 64 S. Ct. 1015 (1944); *Markham* v. *Allen*, 326 U. S. 490, 66 S. Ct. 296 (1946); *Williams* v. *Green Bay Co.*, 326 U. S. 549, 66 S. Ct. 284 (1946); *Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, 69 S. Ct. 301 (1949) and *Propper* v. *Clark*, 337 U. S. 472, 69 S. Ct. 1333 (1949).

In each of these cases an effort was made to have the Federal Courts abdicate their jurisdiction and to have the pertinent question of State law determined by the State Courts. In each decision this Court, following the Meredith case, held that this should not be done but that the Federal Courts should make the appropriate determination of the State law.

The following language in the Spiegel case, supra, upholding the Court of Appeals determination of a question of Illinois law, is suggestive of the case at bar.

> "The questioned ruling was made by three Judges who are constantly required to pass upon Illinois law questions. One of the three Judges has long been a resident and lawyer of Illinois."

Similarly, the determination of the case at bar was made by three Judges who are constantly required to pass upon Florida law questions, and one of them, Circuit Judge Strum, has long been a resident, lawyer and jurist of Florida. As previously pointed out, these three Judges, including the one from Florida, unanimously agreed upon the clear construction of the involved Florida Statute. It

seems almost presumptuous for Petitioner to suggest that these Judges, or the veteran Florida District Judge, needed aid and assistance by the State Courts in the determining of such a relatively simple question.

It is further to be noted that Petitioner did not make her contention that the matter should be referred to the State Courts for determination until after she had lost the decisive round in the Federal Court. This contention would have appeared more sincere had it been made at the inception of the litigation and before the adverse ruling against her, striking her defense. But she waited until after she was faced with a motion for summary judgment, and it was apparent from the previous ruling that she would lose such a motion, before seeking to transfer the litigation to the State Court. (R. 14, 18).

This is tantamount to an effort by one team in a ball game, which is trailing in the score toward the end of the game and which then seeks to start the game all over again on another field with another umpire. Such tactics should certainly not prevail.

We accordingly submit that the District Court was eminently correct in refusing to abdicate its jurisdiction and that denial of the motion of Petitioner that it do so constitutes no ground for the issuance of a writ of certiorari.

CONCLUSION

Thus, it appears that Petitioner has utterly failed to establish any grounds or reasons for the granting of the writ, and has certainly shown none of the "special and important reasons" set forth in Rule 38(5) of this Court.

There was no prior construction of the Statute. Hence, the Courts below did not violate or disregard the local law, but construed it in a manner which appears clearly correct.

There is no conflict between the decision in the case at bar and the one in the Seventh Circuit relied upon by Petitioner. The Statutes involved in the two cases and the facts to which they were applied were entirely different and unlike.

The District Court properly declined to abdicate its jurisdiction to the State Courts but followed its duty in construing the Statute in the absence of a prior State Court determination of the question. Respondent was entitled to obtain the relief sought in the form of its choice.

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MANLEY P. CALDWELL
MADISON F. PACETTI
H. ELMO ROBINSON
501 Harvey Building
West Palm Beach, Florida
Counsel for Respondent.

June, 1953